

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

26975

FILE: B-209547.2**DATE:** December 7, 1983**MATTER OF:** Association of Soil and Foundation
Engineers**DIGEST:**

GAO's refusal, in prior decision, to question a contracting agency's determination to secure services through competitive bidding procedures rather than the procedures prescribed in the Brooks Act for the selection of architectural or engineering firms, is affirmed on reconsideration since it has not been established that the decision was based on errors of fact or law.

The Association of Soil and Foundation Engineers (ASFE) requests that we reconsider our decision in Association of Soil and Foundation Engineers, B-209547, May 23, 1983, 83-1 CPD 551, in which we denied ASFE's protest under invitation for bids (IFB) No. 540-19-83 issued by the Veterans Administration (VA).

ASFE asserted in its protest that, rather than procuring by formal advertising, the VA should have used the special procedures for the procurement of architectural and engineering (A-E) services prescribed by the Brooks Act, 40 U.S.C. § 541 et seq. (1976). We declined to question the VA's actions since ASFE failed to demonstrate that the agency intended to circumvent the act. ASFE alternatively argued that the solicitation overstated the agency's actual needs. We agreed with ASFE on this point, but nonetheless denied the protest on the ground that ASFE was not prejudiced by the error.

ASFE now argues that our conclusion concerning the Brooks Act was based on an erroneous interpretation of the solicitation. ASFE also questions our determination that ASFE was not prejudiced. We affirm our previous decision.

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The VA issued the solicitation to obtain data necessary to determine the feasibility of a site for cemetery development. The contractor is required to drill soil borings, classify soils, perform tests needed to comment on matters such as slope stability, and conduct several types of surveys.

ASFE first contends that our determination concerning the propriety of procuring these services competitively was based upon an erroneous conclusion that the test requirement delineated in the IFB did not require the application of engineering principles and judgment. In support of this assertion, ASFE cites a statement on the record by the contracting officer which, in ASFE's view, is contrary to our conclusion regarding the test requirement.

We need not consider this assertion. Although we did take the position that the test requirement was not A-E in nature, our holding that the use of competitive procedures was proper clearly was not based on this position. Rather, we stated that even assuming the test requirement was A-E in nature, the VA's action was proper. In this regard, we stated that:

"[E]ven if we accept ASFE's assertion that certain aspects of the [test] requirement are A-E in nature, it does not follow as a matter of logical necessity that Brooks Act procedures had to be used in the procurements. The reason is that the Brooks Act does not require that contracts be awarded to A-E firms merely because architects or engineers might do part of the contract work. . . .

". . . [G]iven the relative scope of the clearly nonprofessional services and the alleged engineering services [the test services], we believe the VA's determination [to procure competitively] was reasonable."

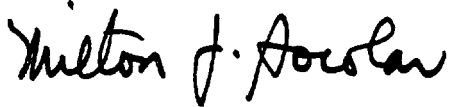
Thus, even if ASFE proved that our interpretation of the test clause was erroneous, this would not establish that our holding was based on an error of fact or law, as is required to prevail in a request for reconsideration. See Computer Data Systems, Inc.--Reconsideration, 61 Comp. Gen. 545 (1982), 82-2 CPD 75. Therefore, we will not consider ASFE's argument.

Next, ASFE submits several arguments to the effect that West Virginia law requires an engineer to submit the report required by the solicitation and to supervise the tests and procedures upon which the report is based. In ASFE's view, this establishes that the services are A-E services which must be secured under Brooks Act procedures. This argument is merely a reformulation of arguments proffered by ASFE in its initial protest, and we will not consider them again. See W. M. Grace, Inc.--Request for Reconsideration, B-202842.2, September 21, 1981, 81-2 CPD 230.

Finally, ASFE contests our finding concerning the effect of the unduly restrictive nature of the solicitation. The solicitation required that an engineer perform the contract and affix his or her seal to all drawings. Inasmuch as the VA admitted that the references to an engineer were inadvertent and that the requirements were not A-E in nature, we agreed with ASFE that the restrictions were not reasonably related to the VA's minimum needs. Because we perceived no prejudice to ASFE's members, however, we denied this ground of the protest.

ASFE now argues that its members were in fact prejudiced in that some did not bid because of the engineering references in a non-Brooks Act solicitation, and others who participated might have bid differently had they based their bids on using nonprofessional personnel.

As we indicated in our May 23 decision, however, ASFE's members were not precluded from participating in or receiving an award under this procurement. ASFE's arguments on reconsideration are, in our view, too speculative to warrant reversal of our decision in that respect. In any event, the contract has been completed, and had been at the time of our initial decision, so that no corrective action with respect to the particular procurement is or was practicable. We point out, however, that in connection with our previous consideration of this matter we notified the VA of the impropriety so that future solicitations would be properly worded to state only the minimum needs of the agency.

for 
Comptroller General
of the United States